

December 8, 2004

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-42 is available for public comments under this procedure. It was requested by counsel, Robert K. Kellner, Esq. on behalf of Pharmavite LLC.

Proposed Advisory Opinion 2004-42 is scheduled to be on the Commission's agenda for its public meeting of Thursday, December 16, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on December 15, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-42, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 8, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Esa L. Sferra
Attorney

Subject: Draft AO 2004-42

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 16, 2004.

Attachment

3
4 Robert K. Kelner, Esq.
5 Covington & Burling
6 1201 Pennsylvania Avenue, NW
7 Washington, DC 20004-2401
8
9

10 Dear Mr. Kelner,

11
12 We are responding to your inquiry regarding (1) whether Pharmavite LLC
13 (“Pharmavite”), a California limited liability company, may pay the administrative and
14 solicitation costs of a separate segregated fund (“SSF”), for which Pharmavite’s sole
15 member will be the connected corporate organization, and (2) whether the SSF may be
16 named after Pharmavite under the Federal Election Campaign Act of 1971, as amended
17 (the “Act”), and Commission regulations.

18 Although Pharmavite is treated as a partnership under Commission regulations,
19 because Pharmavite is *per se* affiliated with its sole member, a corporation, Pharmavite
20 may pay the administrative and solicitation costs of its sole member’s SSF. Additionally,
21 because Pharmavite is in the position of the connected organization’s subsidiary and
22 because naming the PAC after Pharmavite will give the public a more accurate
23 understanding of the PAC’s funding and purpose, the SSF may be named after
24 Pharmavite instead of its connected organization.

25 ***Background***

26 The facts of this request are presented in your letter dated October 22, 2004.

27 Pharmavite is a limited liability company (“LLC”) with its principal place of
28 business in California. Under Internal Revenue Service (“IRS”) regulations, an LLC may
29 choose for tax purposes to be treated as either a corporation or a partnership. 26 CFR

1 301.7701-3(a). However, because Pharmavite's sole member, Otsuka America, Inc.
2 ("OAI"), is a corporation, Pharmavite is precluded from choosing to be treated as a
3 partnership under IRS regulations.¹ 26 CFR 301.7701-2(c)(1). Because Pharmavite has
4 not affirmatively elected treatment as a corporation for tax purposes, Pharmavite is
5 considered a "disregarded entity" by the IRS. 26 CFR 301.7701-3(b)(1) and 7701-
6 2(c)(2). A disregarded entity's activities are treated by the IRS in the same manner as a
7 branch or division of its owner. 26 CFR 301.7701-2(a).

8 Pharmavite wishes to pay the administrative and solicitation costs for an SSF for
9 which its sole member, OAI, will be the connected organization.² The SSF would be
10 named "Pharmavite LLC Political Action Committee," and the name would be
11 abbreviated as "Pharmavite PAC" (the "PAC") for permissible purposes under the Act
12 and Commission regulations. Pharmavite's primary business is manufacturing and
13 selling dietary supplements, and the principal focus of the PAC will be issues of interest
14 to Pharmavite and its employees.

15 Pharmavite will conduct the day-to-day operations of the PAC through
16 Pharmavite personnel. Any decisions concerning the PAC, other than the decision to
17 form the PAC, will be made by a special committee consisting of the non-foreign
18 national board members of OAI and Pharmavite, each of which has one U.S. citizen on
19 its governing board. OPC and any directors, officers, or employees of OPC, OAI, or
20 Pharmavite who are foreign nationals will be recused from directly or indirectly
21 participating in the decision-making process of the SSF. Additionally, the PAC will not

¹ An entity can only be classified as a partnership if it is not a corporation and has at least two members. 26 CFR 301.7701-2(c)(1).

² OAI is a wholly-owned subsidiary of a Japanese corporation, Otsuka Pharmaceutical Company, Ltd. ("OPC").

solicit or accept contributions from OPC and OAI executive or administrative personnel and stockholders, and their families, or from any foreign national.³

Questions Presented

1. *May an LLC that is a “disregarded entity” under IRS regulations, and that is wholly owned by a single incorporated member, pay the administrative and solicitation costs of an SSF for which the corporate member will be the connected organization?*
2. *May an SSF with a corporate connected organization be named after the LLC that pays the SSF’s administrative and solicitation costs?*

Legal Analysis and Conclusions

Question 1: May Pharmavite pay the PAC’s administrative and solicitation costs?

Under 2 U.S.C 441b(b)(2)(C), a corporation may use its general treasury funds to pay for the costs of establishing, administering, or soliciting contributions to its SSF, without a resultant contribution or expenditure. *See also* 2 U.S.C. 431(8)(B)(vi) and (9)(B)(v). A corporation that directly or indirectly establishes, administers, or financially supports a political committee is the connected organization of that committee. 2 U.S.C. 431(7) and 11 CFR 100.6(a). The Act does not extend to a partnership, or an LLC that is treated as a partnership under Commission regulations, the ability granted to a corporation to conduct itself as a connected organization and avail itself of the

³ The Commission notes that Commission regulations prohibit a foreign national from directing, dictating, controlling, or directly or indirectly participating in the decision-making process of a corporation or political committee with regard to Federal or non-Federal election-related activities, such as the making of contributions. 11 CFR 110.20(i). Additionally, the Act and Commission regulations prohibit any “person,” the definition of which includes corporations and SSFs, from soliciting, accepting or receiving a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2) and 110.20(g). The Act and Commission regulations also prohibit a foreign national from making a contribution, directly or through any other person, or an expenditure in connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1) and 11 CFR 110.20(b). You indicate that that Pharmavite, a California LLC, conducts its business and generates revenues in the United States, and that OAI is a domestic holding company for Pharmavite and for a range of other businesses operating in the United States. Therefore, these companies are *bona fide* operating domestic entities and the Commission assumes, based on your representations, that the control, operations, and activities of the PAC will be in compliance with 2 U.S.C. 441e and 11 CFR 110.20. *See* Advisory Opinion 2000-17.

1 contribution and expenditure exemptions. *See* 11 CFR 100.6(a) (definition of “connected
2 organization” does not include partnerships or LLCs) and Advisory Opinions 2001-07
3 and 1992-17. Nevertheless, the Commission has interpreted the Act and Commission
4 regulations to permit a partnership, or an LLC treated as a partnership under Commission
5 regulations, that is owned entirely by one or more corporations and affiliated with at least
6 one of those corporations, to pay the administrative and solicitation costs for the
7 partnership’s political action committee.⁴ *See* Advisory Opinions 2003-28, 2001-18,
8 2001-07, and 1997-13.

9 Although Pharmavite is treated as a disregarded entity by the IRS because it has
10 not elected treatment as a corporation and is not eligible under IRS regulations to elect
11 treatment as a partnership, Commission regulations provide that a non-publicly traded
12 LLC that does not affirmatively elect treatment for tax purposes as a corporation is
13 treated by the Commission as a partnership. Accordingly, Pharmavite is treated as a
14 partnership under Commission regulations. 11 CFR 110.1(g)(2) and (3).

15 Under Commission affiliation regulations, Pharmavite is *per se* affiliated with
16 OAI because OAI is Pharmavite’s sole member. 11 CFR 100.5(g)(3)(i) and
17 110.3(a)(2)(i); *see also* Advisory Opinion 1990-10. Additionally, the Commission has
18 long held that affiliates may include entities other than corporations, such as partnerships
19 and LLCs. *See* Advisory Opinions 2004-32, 2001-18, and 1992-17.

20 Although Pharmavite is treated as a partnership for the purposes of the Act and
21 Commission regulations, because it is owned entirely by, and affiliated with, OAI, a
22 corporation, Pharmavite may perform the functions of a connected organization for the

⁴ The Commission generally permits a corporation’s affiliates to pay the administrative and solicitation costs of the corporation’s SSF. *See, e.g.*, Advisory Opinion 1997-13.

PAC, including paying administrative and solicitation costs. *See* Advisory Opinions 1997-13 and 1994-11. Such support provided by Pharmavite is deemed to be from OAI and the PAC must list OAI as its connected organization on its statement of organization, as it already plans to do. 2 U.S.C. 433(b)(2) and 11 CFR 102.2(a)(1)(ii); *see* Advisory Opinions 1997-13 and 1996-49.

Question 2: May the PAC be named after Pharmavite?

Although the PAC must list OAI as its connected organization, it need not include OAI's name in the PAC's name. While the name of an SSF generally must include the full name of its connected organization, 2 U.S.C. 432(e)(5) and 11 CFR 102.14(c), the Commission has permitted an SSF's name to include only the name of a joint venture LLC that was treated as a partnership under Commission regulations, where the LLC was performing the functions of the SSF's connected organization. *See* Advisory Opinions 2003-28 and 1997-13; *see also* Advisory Opinion 2001-18. Under such circumstances, the Commission has allowed the SSF to omit the corporate names of the LLC's affiliated corporate owners from its name because the LLC was in virtually the same position as a corporate subsidiary of the owner corporation. 11 CFR 102.14(c) (A subsidiary need not include its corporate parent's or other subsidiaries' names in the name of its PAC); *see* Advisory Opinions 2003-28 and 1997-13.

Like the joint venture LLCs, Pharmavite is a wholly corporate-owned LLC treated as a partnership under Commission regulations that is in the position of a subsidiary. Although Pharmavite cannot serve as the PAC's connected organization, it may perform the functions of a connected organization because it is in the same position of a subsidiary of OAI. Therefore, the PAC's name may include Pharmavite's name alone.

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- 2 Enclosures (AOs 2004-32, 2003-28, 2001-18, 2001-07, 1997-13, 1996-49, 1994-11,
- 3 1992-17, and 1990-10)